Kerajaan Malaysia v Jasanusa Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-20-94
ANUAR CJ (MALAYA), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ
3 MAY 1995

Civil Procedure *— Stay of execution of judgment — Tax case — Inherent jurisdiction of court — Effect of ss 103(1) and 106(3) of Income Tax Act 1967 — Whether court can extend stay on entirely new conditions without fresh evidence — Income Tax Act 1967 ss 103(1) & 106(3)*

Revenue Law *— Corporation tax — Appeal — Stay of execution — Whether ss 103(1) and 106(3) of the Income Tax Act 1967 restrict inherent jurisdiction of court to grant stay — Income Tax Act 1967 ss 103(1) & 106(3)*

Revenue Law *— Corporation tax — Appeal — Whether Director General under statutory duty to forward taxpayer's appeal to special commissioners — Whether taxpayer obliged to request in writing — Income Tax Act 1967 s 102(2)*

The respondent, Jasanusa Sdn Bhd ('Jasanusa'), had obtained an order for a limited stay of execution for six months against an order for summary judgment under O 14 of the Rules of the High Court 1980 obtained by the appellant, the Government of Malaysia ('Revenue'), pursuant to two notices of assessments in respect of tax for the years of assessment 1984 and 1986. [See [1993] 3 MLJ 514.] Jasanusa also obtained a further extension of the order for stay until the happening of any one of three specified events. The appellant appealed, contending that the High Court judge had been wrong in law: (i) in granting the order for stay contrary to ss 103(1) and 106(3) of the Income Tax Act 1967 ('the Act') which provide that the assessed amount is due and payable upon service of the relevant notice irrespective of whether there is any appeal and that the court should not entertain any plea that the amount of tax sought to be recovered was excessive; (ii) in holding that the Director General was under a statutory duty to forward Jasanusa's appeal to the special commissioners of income tax despite the absence of a written request by Jasanusa under s 102(2) of the Act; and (iii) by extending the stay of execution on entirely new conditions without fresh evidence contrary to his earlier ruling to grant a limited stay.

Held, dismissing the appeal:

(1) Neither s 103(1) nor s 106(3) of the Act bars a court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case.

(2) It is true that having regard to the provisions of s 102(2) of the Act, in certain circumstances, the taxpayer is entitled, upon the expiry of a period of six months from the date of the giving of the notice of appeal, to address a written request to the Director General to forward the appeal to the special commissioners, whereupon the Director General shall do so within three months from the date of receipt of such request. However, it is not obligatory for the taxpayer to exercise such right. But if the taxpayer fails or neglects to exercise that right, such failure or neglect would not, ipso facto, relieve the Director General of his duty to forward the appeal to the special commissioners, though the time constraints provided for by s 102(2) of the Act would not be applicable. Nevertheless, he would have to do so within a reasonable time and what was reasonable would depend on the particular circumstances of each case.

(3) There was ample material for the judge to have exercised his discretion by extending the order for stay and his decision to do so was in no way contrary to his earlier ruling to grant a limited stay. It is well settled law that the exercise of such a discretion would be interfered with by an appellate court only in exceptional circumstances and the fact that the appellate court might have exercised the discretion differently would not constitute a sufficient ground for overturning the judge's decision to grant the limited stay.

[Bahasa Malaysia summary

Responden, Jasanusa Sdn Bhd ('Jasanusa'), telah memperolehi suatu perintah penggantungan pelaksanaan terhad selama enam bulan terhadap suatu perintah penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 yang diperolehi oleh perayu, Kerajaan Malaysia ('Jabatan Hasil'), berkenaan dengan dua notis taksiran untuk cukai bagi tahun taksiran 1984 dan 1986. [Lihat [1993] 3 MLJ 514.] Jasanusa juga telah memperolehi suatu perlanjutan perintah penggantungan sehingga berlakunya salah satu daripada tiga kejadian yang tertentu. Jabatan Hasil membuat rayuan dengan menegaskan bahawa hakim Mahkamah Tinggi telah silap di segi undang-undang dalam: (i) membenarkan perintah untuk penggantungan itu bertentangan dengan ss 103(1) dan 106(3) Akta Cukai Pendapatan 1967 ('Akta itu') yang memperuntukkan bahawa jumlah yang ditaksirkan kena dan perlu dibayar sebaik sahaja notis yang relevan disampaikan tanpa mengira sama ada terdapat apa-apa rayuan dan bahawa mahkamah tidak harus melayani apa-apa rayuan bahawa jumlah cukai yang cuba didapatkan kembali adalah berlebihan; (ii) memutuskan bahawa Ketua Pengarah mempunyai suatu kewajipan statutori untuk mengemukakan rayuan Jasanusa kepada pesuruhjaya khas cukai pendapatan walaupun tiada permintaan bertulis oleh

Jasanusa di bawah s 102(2) Akta itu; dan (iii) melanjutkan penggantungan pelaksanaan itu atas syarat-syarat yang baru sama sekali tanpa keterangan baru bertentangan dengan keputusan beliau yang terlebih awal untuk membenarkan penggantungan terhad.

Diputuskan, menolak rayuan itu:

(1) Kedua-dua s 103(1) dan s 106(3) Akta itu tidak menghalang mahkamah, dalam keadaan sesuai, daripada melaksanakan kuasa sedia adanya untuk membenarkan penggantungan, walaupun dalam kes cukai.

(2) Adalah benar bahawa dengan mengambil berat tentang peruntukan s 102(2) Akta itu, dalam keadaan tertentu, seseorang pembayar cukai adalah berhak, sebaik sahaja tamatnya tempoh enam bulan dari tarikh pemberian notis rayuan, untuk menujukan suatu permintaan bertulis kepada Ketua Pengarah supaya mengemukakan rayuan itu kepada pesuruhjaya khas, lalu Ketua Pengarah akan berbuat demikian dalam masa tiga bulan dari tarikh penerimaan permintaan sedemikian. Walau bagaimanapun, adalah tidak wajib bagi pembayar cukai untuk menggunakan hak sedemikian. Tetapi sekiranya pembayar cukai itu gagal atau mengabaikan untuk menggunakan hak tersebut, kegagalan atau pengabaian sedemikian tidak akan, secara *ipso facto*, melepaskan Ketua Pengarah daripada kewajipannya untuk mengemukakan rayuan itu kepada pesuruhjaya khas, walaupun kekangan masa yang diperuntukkan oleh s 102(2) Akta itu tidak akan terpakai. Walau bagaimanapun, beliau terpaksa berbuat demikian dalam masa yang munasabah dan apa yang munasabah adalah bergantung kepada keadaan tertentu dalam setiap kes.

(3) Terdapat bahan yang lebih daripada mencukupi untuk hakim itu melaksanakan budi bicaranya dengan melanjutkan perintah untuk penggantungan itu dan keputusan beliau untuk berbuat demikian tidak dalam apa cara juapun bertentangan dengan keputusannya yang terlebih awal untuk membenarkan penggantungan terhad. Ia adalah undang-undang mantap bahawa pelaksanaan budi bicara sedemikian akan diganggu oleh mahkamah rayuan hanya dalam keadaan luar biasa dan hakikat bahawa mahkamah rayuan mungkin telah melaksanakan budi bicara secara berlainan tidak akan merupakan satu alasan yang mencukupi untuk mengubah keputusan hakim itu untuk membenarkan penggantungan terhad itu.]

Notes

For cases on appeals against payment of tax, see 10 *Mallal's Digest* (4th Ed) paras 1491–1505.

For cases on stay of execution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 3120–3125, 3430–3432.

Case referred to

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473 (folld)

Legislation referred to

Income Tax Act 1967 ss 102(2), 103(1), 106(3)
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No T(22)–62 of 1992 (High Court, Tawau)

Hinshawati bte Sharif (*Abdul Karim bin Abdul Jalil* with her) (Senior Federal Counsel) for the appellant.
S Woodhull (*Shearn Delamore & Co*) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): This was an appeal by the Government of Malaysia ('the Revenue') from an order of the High Court Tawau, Sarawak (Ian Chin J) extending an order of stay of execution in respect of an order for summary judgment under O 14, obtained against the taxpayer, Jasanusa Sdn Bhd ('the taxpayer'), on 2 March 1993, pursuant to two notices of assessment, both dated 4 January 1990 in respect of the years of assessment 1984 and 1986, demanding payment of the sums of RM3,183,717.50 and RM2,492,609.85, respectively.

The background facts may be taken in substance from the judgment of the learned judge where they have been set out with admirable clarity and detail.

By a letter dated 15 November 1990 from the Revenue to the taxpayer's agents, the Revenue had requested from the taxpayer the following material:

(1) a list of the vehicles, their registration numbers, chassis numbers, types, engine power, costs, dates of purchase, dates of sales, the names, identity card numbers and addresses of the purchasers and the sale prices;

(2) a letter from the Road Transport Department certifying the vehicles to have been registered in the taxpayer's name; and

(3) copies of the hire-purchase/leasing agreements.

In response to this request, the taxpayer's agents had, by letter dated 26 March 1991, supplied to the Revenue letters of the Forestry Department, documents of the Road Transport Department and lists relating to the ownership, registration numbers, chassis numbers and engine horse powers of some 48 vehicles. This letter ended with the following paragraph:

> Since the vehicles were sold many years ago, our client could not obtain any vehicle registration cards or letters from the Forestry Department or JKJR to substantiate their ownership over the rest of the vehicles. However, efforts are [being] made to obtain confirmation letters from the relevant buyers and these will be forwarded to you if any are received.

A Based on documents now enclosed, we shall be pleased if you could finalize our client's tax affairs for assessment years 1984 and 1986 as soon as possible.

On 17 February 1992, the taxpayer had lodged Form Q with the Revenue which evoked the following response from the Revenue by letter dated B 15 May 1992:

We have received the Form Q. The Director General [intends] to review the assessment under s 101(1).

You are hereby directed to furnish the following particulars in respect of your claim of capital allowances.

C 2.1: List of all the assets along with the date of purchase and documentary evidence of ownership.

2.2: The documentary evidence of use in the company.

2.3: In addition to the above you are hereby requested [to produce] all books of accounts to show and [confirm] the ownership.

D 2 Please note that in the absence of the above documentary evidence, the Director General may not amend the notice of assessment.

3 It is proposed to hold a follow-up meeting on Monday, 25 May 1992 at 10am in our office. The presence of the board of directors is essential.

Contemporaneously, the Revenue had by another letter, also dated E 15 May 1992 addressed to the taxpayer, requested the following material:

(1) schedule of export sale;

(2) schedule of payment of extraction fee;

(3) schedule of payment of royalty;

F (4) schedule of timber purchased;

(5) schedule of timber licence utilized licence issued to outside agency/ party utilized;

(6) schedule of utilization of company's timber licence; and

(7) schedule of purchase of fixed assets.

G The taxpayer's agents had replied thereto by a letter dated 8 June 1992 which, however, was not included in the record of appeal provided. But, this was followed up by another letter dated 2 September 1992, which was included, and which requested an extension of time of up to 9 October 1992, to submit the information and documents requested because the H documents dated back to 1982 and because 'certain vital information and documents from third parties' were being awaited. The Revenue had, on 4 September 1992, caused to be issued the writ of summons herein. The taxpayer's agents had by another letter dated 8 October 1992, again asked for an extension of time of up to 30 November 1992, to supply the information and documents requested.

I However, on 6 November 1992, the Revenue had caused to be served upon the taxpayer the writ of summons herein and, on 2 March 1993, it had obtained summary judgment for the sums demanded in the notices of assessment, interest thereon and costs.

In considering the submissions of counsel for the Revenue, the learned judge said this ([1993] 3 MLJ 514 at pp 520–521):

> The learned senior federal counsel, Abu Samah bin Nordin, had led me through a list of authorities, reported and unreported, for which I am very grateful. I will advert to them as well as to others not referred to by the parties. Though the court has an unfettered discretion whether to grant or refuse a stay of execution, the discretion must, nevertheless, be exercised on established judicial principles (see the Federal Court case of *Mohamad Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126; and *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116). It will, as a rule only, grant a stay if there are special circumstances (see *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406). A stay will be granted if there are special circumstances, notwithstanding that the tax is due and payable under s 103(1) of the Income Tax Act 1967 ('the Act'). What, then, constitute special circumstances? It was said in *Mohamed Mustafa v Kandasami (No 2)* at p 127, that:
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> > 'One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.'

The learned judge then directed himself on the law as follows [at pp 521–523]:

> Therefore, whether a successful appeal to the special commissioners would be rendered nugatory by a refusal to stay execution, is a relevant consideration. Another relevant consideration is the delay and the cause of the delay in the hearing of the appeal of the taxpayer to the special commissioners. See *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 and *Government of the Federation of Malaysia v Haji Ghani Gilong* [1993] 1 MLJ 359. Merits in the appeal is also a relevant consideration and support for this proposition can be found in the following passage in the case of *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116, viz:
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> > 'If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned district judge in exercising his discretion to grant a stay; ...'
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> The case of *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377 also supports the proposition and in fact, VC George J, in that case, was of the opinion that where summary judgment, as distinct from a judgment after a full trial, was obtained and there was every probability that the appeal against the summary judgment would be successful, a stay of execution should be granted. The learned judge went further; he, after referring to, inter alia, *Syarikat Berpakat* case, said the rule regarding special circumstances should be qualified this way:
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> > 'Where a judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances.'

I respectfully agree with those views of the learned VC George J. An attempt was made to define special circumstances by Raja Azlan Shah J (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:

> 'Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.'

The definition only serves to emphasize the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised. I should, finally, refer to the unreported case of *Government of Malaysia v Mechanical Handling Engineering (M) Sdn Bhd* (High Court Civil Suit No S7–21–203–88; Supreme Court Civil Appeal No 01–72–90), a decision of the learned Lim Beng Choon J, cited by the learned senior federal counsel, and where a stay of execution was refused. It was remarked, or it was a finding of the learned judge in that case, that:

(1) the appeal was on tenuous ground;

(2) the particulars requested by the Inland Revenue were supplied as and when the defendant chose to do so;

(3) the evidence showed the defendant was able to pay; and

(4) the defendant was trying to transfer away assets.

The facts of that case are different from the facts of the cases here. *Mohamed Mustafa v Kandasami (No 2)* was not referred to there. The passage, cited by the learned judge, of the Australian case of *Commonwealth of Australia v Cook* [1940] 1 AITR 551, at p 552, dealt with the right to enter judgment, not with a stay of execution. As for the passage of *Deputy Federal Commissioner of Taxation v Roma Industries Pte Ltd* [1976] 6 ATR 54, which was also cited by the learned judge, it dealt with the right to a winding-up order of a company whose debt was subject to appeal. Those passages, which were from cases not dealing with a stay of execution, should not be used to support the opinion of the learned judge that the court had limited power to stay an execution. It is not disputed that s 103(1) of the Act provides for the assessed amount to be due and payable upon service of the relevant notice, irrespective of whether there is any appeal, but the Act does not have any provision curtailing or restricting the inherent jurisdiction of the court to stay an execution. When a party wishes to exercise a right to resort to the procedures of the court to enforce a judgment, that right is subject to the powers of the court which include a power under its inherent jurisdiction to stay an execution subject to established judicial principles. Therefore, if the *Government of Malaysia v Mechanical Handling Engineering (M) Sdn Bhd* case should decide that primacy should be given to the fact that the assessed tax must be paid irrespective of any appeal, then I respectfully disagreed. If

it is a policy of the Act, that the assessed tax ought to be paid first before the hearing of the appeal, then that policy is only one of the factors to be considered but it cannot have primacy of consideration and will have to give way to cases where the appeal was not heard through no fault of the taxpayer, like in the cases of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 and *Government of the Federation of Malaysia v Haji Ghani Gilong* [1993] 1 MLJ 359. Anyway, a passage at p 4575, in the case of *Deputy Federal Commissioner of Taxation v Mackay* (1982) 82 ATC 4571, which was also cited by the learned judge, would appear to dispel any notion of primacy to be given to the policy of the Act to have the tax collected first as the passage speaks of two clear instances where the court had exercised its discretion to stay and they were, where there had been an abuse of position and where there was extreme personal hardship. Aside from that, various other Australian authorities cited by the learned judge support the principle that the merits of the appeal is a factor to be considered. See *Deputy Federal Commissioner of Taxation v Mackay*; *Deputy Commissioner of Taxation (Vic) v Trevaskis* (1984) 15 ATR 867 and *Deputy Federal Commissioner of Taxation v Brewer* (1987) ATC 4560, which are all in line with *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126.

Matters of this nature involve, inter alia, balancing the need of the government to realize the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The court should be ever vigilant against taxpayers who may use the procedure of the court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment. It should not be much of a difficulty for the court to see the genuineness of an appeal or the willingness of the taxpayer to comply with all reasonable requests of the Director, if they exist, and thus move the court to stay the execution. Having so apprised myself of the legal principles, I will now apply them to the facts and deliver my decisions.

The judge then proceeded to apply the legal principles enunciated in the various authorities cited to and by him and arrived at the following conclusions on the application for stay [at pp 523–526]:

It is common ground that despite s 99(1) of the Act, the Form Q, in so far as Sabah is concerned, is never filed within the time stipulated by the said section but is filed only after the Inland Revenue has distributed the Form Q and after an agreement cannot be reached between the taxpayer and the Inland Revenue as regards the amount of the tax payable. The apparent lateness in both cases in the filing of the Form Q is not to be an issue, in that no advantage will be taken of s 99(1) of the Act; this, the learned senior federal counsel had conceded.

In the Mastan case, the assessments were disputed as far back as 13 July 1977 after the service of the notices of additional assessments on the defendant in July 1977. The taxes were, with the consent of the plaintiff, stood over to await the decision, which was then pending, of the special

commissioners in another case. The decision of that case was given almost 11 years later, on 29 March 1988. The plaintiff thereafter, on 2 April 1988, demanded payment of the tax to which the defendant, by a letter dated 5 July 1988, still maintained that the taxes were not payable and asked for the Form Q to enable him to formally lodge the appeal. The Form Q was despatched to the tax agent on 20 July 1988, but it was not till 3 April 1991 that the defendant lodged the Form Q, followed with a further amended Form Q on 3 September 1991, coupled with a request that the Form Q be forwarded to the special commissioners. Up to that time, the plaintiff took no steps to recover the assessed tax. Instead of forwarding the appeal to the special commissioners, the plaintiff, on 17 October 1991, took out the writ and, on 6 April 1993, obtained summary judgment.

The defendant, as regards the additional assessments, maintained that the sums, which were termed 'nett proceeds', 'should be an allowable deduction as it was expenditure incurred wholly and exclusively in producing the gross income and/or it is an expenditure allowable under s 39(1)(g) of the Act'. I am unable to agree with the learned senior federal counsel that the defendant's only contention was that the mere filing of the appeal amounted to special circumstances. Mirdin Mamdin Esq, learned counsel for the defendant, orally submitted and contended, which is the proper thing to do, rather than in the affidavit of the defendant (see *Yamamori (Hong Kong) Ltd v Davidson & Ors* [1992] 2 MLJ 410), that the facts disclosed by the affidavit disclosed special circumstances and, in particular, that there was no fault on the part of the defendant that his appeal was still not heard by the special commissioners. The learned counsel also submitted that the appeal would be of 'no efficacy' if a stay was not granted. Was the defendant at fault in his appeal to the special commissioners not being heard to date? As for the period between 1977 and July 1988, the defendant was clearly not at fault because the tax was stood over and the Form Q requested by him was not then forwarded to him because of an appeal in another case which, according to the plaintiff, had a bearing on the present case. What then of the period between July 1988, when the tax agent of the defendant had received the Form Q, and just before April 1991, when the defendant submitted the Form Q? Here, there was an unexplained delay on the part of the defendant of about 21 months in submitting the Form Q. But, between the time the Form Q was lodged in April 1991, and June 1993, the Form Q, for a period of more than 25 months, had still not been forwarded by the plaintiff to the special commissioners and the reason appears in the said letter of the Inland Revenue dated 7 May 1993, which is that the Director was not going to review the assessment and hence the appeal was not sent to the special commissioners. Therefore, whatever the fault of the defendant in not returning the Form Q until April 1991, he had not, subsequent thereto, contributed to the fault in not having his appeal forwarded from April 1991 until now, which delay, is the immediate delay which the court is concerned with, and bearing in mind that the plaintiff does not insist on strict compliance with s 99(1) of the Act. Since it was not argued by the learned senior federal counsel that the appeal is frivolous, I therefore assume that there is substance in the appeal. Since there is substance in the appeal and coupled with the fact that it was no fault of the defendant that his appeal was not yet heard by the special commissioners, I grant the order of stay of execution. But what if the Director continues to refuse to submit the appeal to the special commissioners? In such an event,

the court, in order not to prejudge the issue of whether the plaintiff was right in not forwarding the appeal to the special commissioners, expects the defendant to initiate the appropriate legal action to have the dispute as to whether the appeal is fit to be submitted to the special commissioners, adjudicated. For the purpose, the stay of execution is to last six months from the date hereof and will only be extended if I am satisfied on the adjourned date of hearing, upon affidavit evidence to be filed by the defendant, that, in the event of the director continuing to refuse to refer his appeal to the special commissioners, he had taken the necessary legal action to have that dispute adjudicated. The dispute regarding the tax is a simple question of law which I have earlier referred to. There is no reason why that dispute cannot be resolved with the minimum of time; if it cannot, the fault lies with the system and the defendant should not be punished for it. The summons herein is therefore adjourned to 10 January 1994, at 9am for the purpose of determining whether the stay of execution should be extended. I will now turn to the Jasanusa case.

In the Jasanusa case, the events spanned a shorter period than the 16 years in the Mastan case. The notices of assessments were issued in January 1990, and were in respect of the years of assessment of 1984 and 1986. There were exchanges of letters between the plaintiff and the defendant regarding the taxes. The defendant endeavoured to fulfil the requests of the plaintiff for information and documents. The defendant filed the Form Q in February 1992, and the plaintiff reacted by a letter of 15 May 1992, saying that the Director intended to review the assessment under s 101 of the Act and asked for particulars of everything that the defendant owned and proof of use and of ownership. Given the mass of information and documents required, quite naturally the defendant, on two occasions, asked for time up to 30 November 1992 for compliance. Instead of acceding to the request for time, the plaintiff took out the writ herein and obtained summary judgment on 2 March 1993; at which time the Director still had not changed his stated intention to review the assessment which he indicated in his letter of 15 May 1992. Quite a substantial amount of information, in the form of documents certifying to the ownership, registration number and capacity of the vehicles, have to date already been supplied by the defendant to the plaintiff. If the Director was not happy with what he had been supplied and was not agreeable to extending the time for the defendant to supply the information and documents, he should have written to the defendant to inform the defendant that he had changed his mind about reviewing the assessment; this was not done despite the intimation by the defendant, in the said letter of 26 March 1991, that the defendant's case for review rested with whatever information and documents the defendant had, by that date, supplied. The defendant is still holding on to the hope of a review held out by the said letter of the Director which obviates the necessity of an appeal. Therefore, that the appeal of the defendant is still not heard is not the fault of the defendant. I therefore also grant a stay of execution. But in this case, the stay will be for a period of six months and will only be extended if I am satisfied, on the adjourned date of hearing of the summons herein, upon affidavit evidence to be filed by the defendant, that the defendant had done all that it could in complying with all the reasonable requests of the Director for information and documents, or that the defendant had unequivocally stated that it would rely only on whatever information and documents they had already supplied for the purpose of their appeal to the special

commissioners. The evidence shows that the defendant is prepared (despite the said intimation that it is prepared to rest its case on whatever has already been supplied) but has yet to supply certain information and documents, which may result in a review of the assessments. In order not, by the order of stay, to encourage indolence on the part of the defendant in supplying further information and documents nor to provide the defendant with an indefinite legal shield to defer payment and, also, in order to assure myself that the defendant, after the grant of the stay, will make all reasonable efforts to comply with the requests of the Director or, at least, has hereafter stated unequivocally that it will not rely on any other documents for its case for a review or appeal, a hearing, sitting six months from now, will be had to determine whether a stay by then is still justified. The summons herein is therefore adjourned to 10 January 1994, at 9am, for the purpose of determining whether the stay of execution should be extended. The parties are at liberty to file further affidavits for the purpose of the adjourned hearing.

Costs of the applications are awarded to the two defendants.

Pursuant to his judgment aforesaid, which was dated 19 July 1993, the learned judge had on 10 January 1994 heard a further application by the taxpayer to determine whether the limited order for stay aforesaid should or should not continue.

In setting out the case for the taxpayer, the learned judge said this:

In support of the argument for a continuing stay, the defendant filed an affidavit, deposed to by a Teen Khen Fong on 7 January 1994, disclosing the fact that the Director of Inland Revenue had on 15 September 1993 requested particulars, including 'confirmation letters from the relevant buyers' relating to 166 vehicles, and the letter ended with a note that the particulars ought to be supplied immediately so that the defendant's appeal for a review could be settled as soon as possible. The defendant replied, through their tax agents on 21 September 1993, to say that they are preparing the information requested and shall reply as soon as it is completed. Mr Valentine Willie, counsel for the defendant, argued that the request for particulars in respect of 166 vehicles takes time and the information requested goes as far back as the year 1984; it, therefore, takes time to comply. The defendant requires six months to reply. In any event, Mr Valentine Willie argued, if the Director of Inland Revenue feels that he is not prepared to wait any longer, which means he is going to stick by his assessment, he can simply tell the defendant so, in which event, the plaintiff will also have to say whether they are going to forward the appeal to the special commissioners of Income Tax or not. Until that time, the stay of execution should continue, argued Mr Valentine Willie.

The learned judge then referred to the submission of counsel for the Revenue in the following terms:

Mr Abu Samah bin Nordin, senior federal counsel, confined himself to saying that there is no appeal pending before the special commissioners and that, therefore, there is no question of a stay of execution pending the disposal of the appeal.

The learned judge then arrived at the following conclusions on the application for continuance of the stay:

The appeal is still not before the special commissioners because it has not been transmitted by the Director and it has not been transmitted because he, though not saying so expressly but necessarily by implication, feels that his assessment may be reviewed and thus may dispense with the necessity of an appeal. It cannot be argued that the appeal is still not before the special commissioners when the Director is responsible for the appeal not being before the special commissioners. Mr Abu Samah Nordin further argued that the defendant has no right to have the appeal forwarded to the special commissioners. I am of the opinion that the Director must surely decide and say unequivocally that he is not going to forward the appeal to the special commissioners and this he has not done. It is only when the Director has so decided and the defendant takes no legal step to compel the transmission of the appeal to the special commissioners, can it then be said that the appeal is, through no fault of the defendant, not before the special commissioners and that, therefore, there is no question of a stay of execution before the disposal of the appeal. It is not the case here. The stay of execution is to continue until after the happening of any of the following events:

(1) the Director shall have decided not to forward the appeal of the defendant to the special commissioners, following which decision the defendant does not, within the time stipulated by law, take legal proceedings to compel the transmission of the appeal to the special commissioners; or

(2) the defendant, though he makes an application to the court to compel the transmission of the appeal following the refusal of the Director to transmit the appeal to the special commissioners, fails to get an order of the court for the transmission of the appeal to the special commissioners; or

(3) the special commissioners rule against the defendant after the hearing of the appeal of the defendant by the special commissioners following the transmission by the Director to them of the appeal.

Before us, the limited stay granted by the learned judge was attacked by the Revenue on three separate grounds, namely:

Firstly, it was contended that the learned judge was wrong in law in having granted the order for stay, notwithstanding the provisions of ss 103(1) and 106(3) of the Income Tax Act 1967 ('the Act') which says this:

103 Payment of tax

(1) Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

106 Recovery by suit

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4), (5) or (5A).

A With respect, in our view, neither s 103(1) nor s 106(3) bars a court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case. (See the Supreme Court decision in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 at p 475 col 2 last paragraph, per Gunn Chit Tuan CJ.)

B Secondly, it was contended that the learned judge was wrong in law in holding that the Director General was under a statutory duty to forward the taxpayer's appeal to the special commissioners, notwithstanding the absence of any request in writing by the taxpayer to do so.

It is true that having regard to the provisions of s 102(2), in certain C circumstances, the taxpayer is entitled, upon the expiry of a period of six months from the date of the giving of the notice of appeal, to address a written request to the Director General to send the appeal forward to the special commissioners, whereupon, the Director General shall do so within three months from the date of receipt of such request. However, it is not obligatory for the taxpayer to exercise such right.

D But, having said that, we must add if the taxpayer fails or neglects to exercise that right, such failure or neglect would not, *ipso facto*, relieve the Director General of his duty to send the appeal forward to the special commissioners, though, of course, the time constraints provided for by s 102(2) of the Act would not be applicable. Nevertheless, he would have E to do so within a reasonable time, and what is reasonable would depend on the particular circumstances of each case.

Thirdly, it was contended that the learned judge had erred in law and in fact in extending the stay of execution on entirely new conditions without fresh evidence, namely, until the happening of any one of the three events stated in his ruling dated 22 January 1994, contrary to what was F decided in his earlier ruling dated 19 July 1993, which allowed the taxpayer more time to comply with the reasonable request of the Director General for information and documents or until the taxpayer had stated that it would rely only on whatever information it had already supplied for purposes of the appeal to the special commissioners.

G With respect, we considered that there was ample material for the learned judge to have exercised his discretion by extending the order for stay and his decision to do so was in no way contrary to his earlier ruling to grant a limited stay.

It is well settled law that the exercise of such a discretion will be H interfered with by an appellate court only in exceptional circumstances; for example, where it has been demonstrated that the decision of the judge below is shown to have depended on an erroneous basis of law or fact or where no reasonable explanation is open save that the decision depended on an erroneous basis of law or fact. More particularly, the fact that we, as an appellate court, might have exercised the discretion differently is beside I the point and will not therefore constitute a sufficient ground for overturning the judge's decision to grant the limited stay.

Applying the above principles to the circumstances of the present case, we considered that there were no grounds upon which we would have been justified in interfering with the learned judge's exercise of discretion in extending the order for stay.

The result, therefore, was that at the conclusion of the arguments, we had dismissed this appeal with costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim